

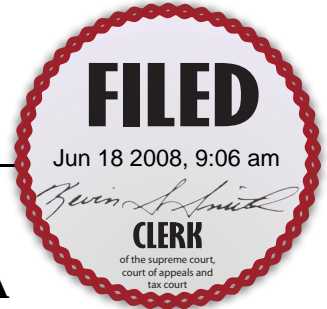
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TROUTWINE ESTATES DEVELOPMENT )  
COMPANY, LLC, DANIEL JORDAN and )  
MICHAEL D. JORDAN, and )  
MASTERMARK, INC., )

Appellants-Defendants/Counter Plaintiffs, )

vs. )

COMSUB DESIGN AND ENGINEERING, INC., )

Appellee-Plaintiff/Counter Defendant. )

No. 45A04-0802-CV-111

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Diane Kavadias Schneider, Judge  
Cause No. 45D01-9905-CP-370

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**June 18, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

Following our remand of this case to the trial court with instructions to enter more specific findings, Troutwine Estates Development Company, LLC (“Troutwine”), Daniel Jordan (“Jordan”), Michael D. Jordan, and Mastermark, Inc. (“Mastermark” and, collectively, “the Developers”), challenge the sufficiency of the finding supporting the imposition of individual liability on the Developers in favor of ComSub Design and Engineering, Inc. (“ComSub”). We remand once again with instructions to enter more specific findings.

We reiterate the relevant facts and procedural history from our previous opinion in this case:

Between 1992 and 1998, ComSub provided design and engineering services to Troutwine, a limited liability company formed for the purpose of improving properties in a subdivision outside of Crown Point, Indiana, through addition of streets, sewers, and utilities. The land was thereafter sold for construction of multifamily dwellings. The owner of ComSub, Steve Manich, was one of Troutwine’s three managers, along with Jordan, and Jordan’s son, Michael. The Jordans also own Mastermark, the construction company that eventually purchased the land from Troutwine and built the dwellings.

In 1994, Manich gave Jordan a document entitled “Agreement for Engineering Services” (“Agreement”). Its provisions included “design phase” and “construction phase” services, as well as payment rates for each. Appellant’s Appendix at 35-37. Design phase services included: (1) meeting with government officials for determination of requirements for subdivision; (2) performance of field surveys for preparation of plats; (3) rendering engineering designs, plans, and drawings including streets, sewers, and other project improvements; (4) furnishing these plans and plats; and (5) assisting in receiving bids for the improvements. Construction phase services included: (1) setting construction stakes for sewers, water mains, grading, curbing, and other improvements; (2) preparing individual lot surveys, setting foundation stakes, and building permit plats; (3) setting permanent iron markings at property corners; and (4) “[p]rovid[ing] general supervision, detailed inspection, and/or other services not covered by this agreement or as ordered by [Troutwine].” *Id.* at 36. Design phase payment was established as “a lump sum fee based on the total number of acres of the project multiplied by Eight Hundred and Ten Dollars (\$810.00) per acre.” *Id.* Construction phase payment was “based on a per diem rate based on the number of hours of services performed by the hourly rates set forth in Section H.” *Id.* Manich’s

applicable hourly rate was as a “principal” earning ninety dollars per hour. *Id.* at 37. Jordan did not sign the Agreement. Nevertheless, Manich informed Jordan that services performed by ComSub would be under the terms written in the Agreement.

ComSub received payment under the Agreement’s terms for the design phase services it provided. After completion of the design phase, Troutwine directed ComSub to make revisions and changes to the plans and to perform general construction observation by monitoring the construction of improvements, for which Manich generated a cost analysis of the work performed on each lot of the project. ComSub received payment only for the construction phase service of setting stakes. The total amount paid to ComSub for design and construction phase services was \$68,750.15. In addition, payments were also made directly to Dale Catt and Larry McClelland for setting stakes, totaling \$9,740.00. Testimony at trial indicated that Catt and McClelland were subcontractors, although the trial court also referred to them as ComSub employees.

In 1998, after a dispute with Jordan, Manich quit the project. He later submitted three separate invoices for services provided, but for which Troutwine had not paid. The first was a September 2, 1998, invoice in the amount of \$67,050.00 for engineering construction supervision provided between 1995 and 1997. The second was a September 24, 1998, invoice in the amount of \$9,720.00 for revision of street names and address changes. The third invoice was dated October 22, 1998, in the amount of \$5,130.00 for calculations of cost distribution for work performed on each lot. These invoices did not itemize amounts, hours, costs, or scope of work performed. However, Troutwine did not dispute the hours reported or the performance of the work, yet refused to pay ComSub.

ComSub filed a complaint for payment in May of 1999. The Developers filed a counterclaim alleging professional negligence by ComSub and Manich. Each party requested summary judgment, which the trial court denied. *A bench trial followed in which the parties requested written findings and conclusions thereon.* During the evidence on the Developers’ counterclaim for professional negligence, the trial court excluded expert testimony and photographic evidence offered by the Developers. On January 24, 2005, the parties submitted proposed special findings and conclusions.

The trial court determined that the unsigned written contract did not constitute an express contract, written or oral, between ComSub and Troutwine. It also concluded that there was a lack of evidence of mutual assent or a meeting of the minds, resulting in no contract being formed. Instead, the trial court applied the equitable doctrine of quantum meruit, requiring that ComSub be compensated for services it rendered to avoid unjust enrichment of Troutwine. The trial court also concluded that the Developers failed to meet the burden of proof in their counterclaim against ComSub and

Manich for professional negligence. Judgment was entered for ComSub on September 1, 2005, in an amount totaling \$72,151.00. This represented the total amounts in ComSub's invoices (\$81,900.00), reduced by the total amount paid to Catt and McClelland (\$9,740.00) in order to prevent a double recovery. The trial court denied ComSub's request for prejudgment interest.

The Developers [appealed] the judgment's basis in quantum meruit, as well as the imposition of personal liability upon Jordan and the other individual defendants. ComSub cross-appeal[ed], calling into question the trial court's decisions in limitation of the amount it was awarded.

*Troutwine Estates Dev. Co. v. ComSub Design & Eng'g, Inc.*, 854 N.E.2d 890, 894-96 (Ind. Ct. App. 2006) (emphasis added) (footnote omitted), *trans. denied* (2007).

In a published opinion, Judge Robb held, among other things, that ComSub was entitled to recover in quantum meruit and considered, as a matter of first impression, the "[a]ssignment of personal liability for the obligations or debts of an Indiana limited liability company[.]" *Id.* at 898. Judge Robb addressed that issue as follows:

As recognized in the trial court's findings, Troutwine is a limited liability company principally based in Lake County, Indiana. Manich, Jordan, and Michael D. Jordan, who act as the company's sole managers, are the only three individuals associated with Troutwine. The purpose of a limited liability company is to provide individuals the same protection enjoyed by shareholders of a corporation through creation of a distinct legal entity, while at the same time featuring pass-through taxation similar to that enjoyed by partners. The Indiana Business Flexibility Act controls the creation and operation of limited liability companies in Indiana. *Brant v. Krilich*, 835 N.E.2d 582, 592 (Ind. Ct. App. 2005). In terms of personal liability, the Indiana Business Flexibility Act states:

A member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company. A member, a manager, an agent, or an employee of a limited liability company may be personally liable for the person's own acts or omissions.

Ind. Code § 23-18-3-3(a). Thus, individuals associated with a limited liability company are not personally liable merely because of their ownership in the

entity, while at the same time, association with a limited liability company does not preclude liability for one's own actions or omissions.

Because the Indiana Business Flexibility Act provides protections to limited liability companies like those of corporations, to circumvent those protections we apply an analysis similar to that for determining the personal liability of a corporation's officers. *Brant*, 835 N.E.2d at 590. We note that courts in other jurisdictions generally do the same by considering factors necessary to pierce the corporate veil.

In *Aronson v. Price*, 644 N.E.2d 864, 868 (Ind. 1994), our supreme court explained that proper adherence to corporate formalities is a factor in determining whether a plaintiff has met its burden of proof in seeking to impose personal liability on a shareholder for acts of the corporation. "Lack of observance of formalities can provide circumstantial evidence of shareholder abuse and shareholder use of the corporation as a conduit for personal affairs."

*Id.* To meet its burden, the plaintiff may also present evidence showing:

- (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporate shareholders or directors; (4) use of the corporation to promote fraud, injustice, or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; ... or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

*Brant*, 835 N.E.2d at 590. Thus, in deciding whether to pierce the corporate veil or circumvent the protections of a limited liability corporation, "[a] court engages in a highly fact-sensitive inquiry." *Id.*

In support of the trial court's determination in the present case, ComSub argues that "Jordan used [Troutwine] as merely his alter ego." Appellee's Brief at 11. Without citation to the record, ComSub claims that Jordan failed to transfer ownership of the land to Troutwine, yet used Troutwine's money to pay the mortgage on the land. Also without citation to the record, ComSub alleges that Troutwine was used as Mastermark's banker, and paid for the construction company's stake-setting. In addition, ComSub argues that Jordan failed to satisfy necessary formalities, but points only to corporate requirements such as holding meetings and maintaining minutes. Lastly, ComSub suggests that Jordan, his son Michael, and their jointly-owned company Mastermark have admitted personal liability by pursuing a counterclaim in their own names rather than on behalf of Troutwine.

It is unclear the extent to which the trial court relied on this or other evidence presented at trial in rendering judgment. The trial court did not enunciate findings of fact with regard to the personal liability of Jordan, his son Michael, or Mastermark. Nor did the trial court draw conclusions in this regard. Without findings and conclusions that support the judgment, we cannot say the trial court properly assigned personal liability. Because this is a

highly fact-sensitive determination, it is properly within the province of the trial court as the finder of fact, and we will not impose upon its discretion. However, without assigning weight to the evidence, we note that ComSub bears the burden of proof with regard to each individually named defendant. We also note that it is unclear whether Troutwine's limited liability protection extends to Mastermark, a separate entity not affiliated with Troutwine as a member or manager, and with which Troutwine appears to have arranged for construction services. Ultimately, each individual defendant's insulation from liability is also questionable because the basis for judgment was to prevent unjust enrichment, not because of a signed contract between ComSub and Troutwine. Thus, the benefit of ComSub's performance did not necessarily accrue to Troutwine, but instead may have accrued to individual defendants, who would therefore be liable for the value of those services. In order to clarify the trial court's basis for judgment, we remand on the issue of the individual liability of Daniel Jordan, Michael D. Jordan, and Mastermark.

*Id.* at 898-900 (footnote and some citations omitted). Judge Robb then addressed the remaining issues, none of which have resurfaced in this appeal. On April 17, 2007, our supreme court denied Troutwine and the Developers' petition to transfer.

On remand, the trial court amended its judgment to include the following "finding":

The corporate Judgment Defendant [i.e., Troutwine] was the alter ego of the principles [sic] Daniel Jordan and Michael Jordan and was used as the alter ego of those two individual's [sic] other businesses, Mastermark Builders, Inc[.], so that the corporate veil should be pierced and the judgment be against those Defendants.

Appellants' App. at 20.<sup>1</sup>

As mentioned above, both parties requested the trial court to make special findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52.

A special finding of fact, as opposed to a general finding, contains all facts necessary for recovery by a party in whose favor conclusions of law are found

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<sup>1</sup> The amended judgment indicates that ComSub's attorney submitted the proposed order that was adopted by the trial court. Appellants' App. at 21. "Although it is not prohibited to adopt a party's proposed order verbatim, this practice weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court." *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 993 n.6 (Ind. Ct. App. 2005).

and should contain a statement of the ultimate facts from which the trial court determines legal rights of the parties to the action. The purpose of making special findings is to provide parties and reviewing courts with the theory upon which the judge decided the case so that the right of review for error might be effectively preserved.

Whether special findings are adequate depends upon whether they are sufficient to disclose a valid basis under the issues for the legal result reached in the judgment. In reviewing special findings, the appellate court may not affirm the trial court's judgment on any ground which the evidence supports, but must determine if specific findings are adequate to support the trial court's decision.

*Willett v. Clark*, 542 N.E.2d 1354, 1357 (Ind. Ct. App. 1989) (citations omitted).

We agree with Troutwine and the Developers that the trial court's finding is actually a conclusion unsupported by any factual findings from the evidence upon which it might have relied in determining that Troutwine was the Developers' alter ego. In other words, the trial court's finding is inadequate to support its judgment. The absence of specific factual findings is particularly vexing given Judge Robb's observations in the previous appeal regarding the "highly fact-sensitive inquiry" required to determine whether to "circumvent the protections of a limited liability corporation[.]" *Troutwine*, 854 N.E.2d at 900. In sum, we must remand once again with instructions to enter specific factual findings regarding the basis for imposing individual liability on Daniel Jordan, Michael D. Jordan, and Mastermark.<sup>2</sup>

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<sup>2</sup> ComSub contends that the record contains sufficient evidence to support the trial court's conclusion and invites us to review the portions of the transcript and the exhibits to which it cites. We must decline ComSub's invitation. As did Judge Robb, we have no way of knowing which evidence the trial court found to be dispositive and/or credible, and, in any event, ComSub failed to provide us with the transcript and the exhibits. Likewise, we must decline Troutwine and the Developers' invitation to find that the trial court's "failure to come forward with any findings of fact ... render[s] the judgment against [them] error as a matter of law and subject to reversal." Appellants' Br. at 9.

Remanded.

BARNES, J., and BRADFORD, J., concur.